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No. 09-504

In the Supreme Court of the United States

DAVID PAUL HAMMER, PETITIONER

v.

JOHN D. ASHCROFT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

In *Pell* v. *Procunier*, 417 U.S. 817 (1974), and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974), this Court held that prison policies prohibiting face-to-face interviews between prisoners and the media were consistent with the First Amendment. The question presented here is:

Whether a policy specific to the death-row unit at the United States Penitentiary in Terre Haute that permits prisoners to have contact with media representatives through written correspondence or approved telephone calls but prohibits them from conducting face-to-face interviews with the media is reasonably related to legitimate penological interests.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-30a) is reported at 570 F.3d 798. The panel opinion of the court of appeals (Pet. App. 31a-48a) is reported at 512 F.3d 961. The opinion of the district court (Pet. App. 49a-62a) is unreported. A prior opinion of the court of appeals (Pet. App. 63a-70a) is not published in the *Federal Reporter* but is reprinted in 42 Fed. Appx. 861. The original order of the district court dismissing the case (Pet. App. 71a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2009. On September 15, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 23, 2009, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a prisoner on federal death row, housed with the other death-row inmates in the Special Confinement Unit (SCU) at the United States Penitentiary (USP) in Terre Haute, Indiana. Gov't C.A. Br. 3. The Bureau of Prisons (BOP) opened the SCU in July 1999 to house male inmates sentenced to death by federal courts. Pet. App. 32a. The SCU also houses inmates on "administrative detention status." *Ibid.*

Petitioner pleaded guilty and was sentenced to death for murdering his cellmate while confined at USP-Allenwood. As the district court in his criminal case explained:

> [Petitioner] did not dispute that he tied Mr. Marti to the bed, put a sock in Mr. Marti's mouth, put Mr. Marti in a sleeper hold, rendered him unconscious, and then took a piece of cloth and strangled him to death. [Petitioner] did not deny that he told inmates prior to the incident that he was going to kill Mr. Marti. The portions of Government counsel's summary which [petitioner] did not deny compelled the court to find intent to kill (malice) and premeditation.

United States v. *Hammer*, 404 F. Supp. 2d 676, 683 (M.D. Pa. 2005), as amended, No. 4:CR-96-239 (M.D. Pa. Jan. 3 and 4, 2006).[1]

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[1] The court upheld petitioner's guilty plea, but vacated the death sentence subject to retrial on the penalty for reasons unrelated to this appeal. 404 F. Supp. 2d at 801 (ordering retrial on penalty because of *Brady* violations). The Third Circuit dismissed the parties' appeals for

2. a. The BOP operates under policies that are promulgated in Program Statements applicable to BOP institutions. Individual institutions within the federal prison system are permitted to issue institution-specific policies in Institution Supplements. Gov't C.A. Br. 3. Following reintroduction of the federal death penalty and activation of the SCU, "it became necessary to devise new, and alter existing, policies to address the unique needs of the SCU." C.A. Supp. App. 10.

Program Statement 1480.05, adopted in September 2000, addresses news media contacts and directs each institution to develop its own Institution Supplement. C.A. App. 139-149. Pursuant to that directive, on April 16, 2001, USP-Terre Haute issued Institution Supplement THA-1480.05A (and THA-1480.05B, which is identical, except for the date and signature). Pet. App. 103a-111a. THA-1480.05A provides that, among other things, "[a]n inmate may initiate an interview with the news media by regular correspondence or through inmate correspondence procedures" and that news media representatives "may initiate an interview with a particular inmate through correspondence." *Id.* at 103a-104a.

For SCU inmates, THA-1480.05A provides that "[t]o maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted." Pet. App. 105a. Like all inmates at USP-Terre Haute, SCU inmates retain access to the media through "the General and Special Mail Procedures, as well as monitored or unmonitored phone calls." *Id.* at 106a, 107a. An SCU inmate who wishes to

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lack of a final order. 564 F.3d 628 (2009). The government has until April 2010 to state its intentions with respect to resentencing. See 96-CR-239 Docket entry No. 1256 (M.D. Pa. Aug. 27, 2009). In the meantime, petitioner remains housed on death row in the SCU.

contact a media representative by phone must place that person on his approved social telephone list for monitored, unscheduled calls, and the media representative must complete a "Conditions for Media Telephone Contact" form. *Id.* at 106a. That form requires the media representative to agree to certain conditions, including:

1. **TELEPHONE CONVERSATIONS WITH AN SCU INMATE MAY NOT BE RECORDED OR BROADCAST.**

2. You are prohibited from asking or discussing with the above-named SCU inmate any information regarding other federal or state inmates. If the above-named SCU inmate provides you with any information regarding other federal or state inmates, you are prohibited from publishing such information. Comments made by one inmate concerning another could violate the privacy interests of the other inmate, and might cause a reaction that could threaten the safety, security, or good order of the institution.

Id. at 110a-111a. SCU inmates can also request unmonitored telephone interviews. *Id.* at 106a-107a.

As respondent Harley G. Lappin, former Warden at USP-Terre Haute (Warden Lappin), explained, the new policy was intended to balance the interests of the SCU inmates and the journalists, with the interests of BOP in security and good order and the rights of all inmates. C.A. Supp. App. 11. One concern underlying the prohibition on face-to-face interviews and publication of recordings of interviews was that inmates would gain "special status" through media exposure. *Ibid.* As Warden Lappin explained, inmates must all be of equal status at the prison because an inmate with greater status

can become a "jail celebrit[y]," who is "an authority figure to other inmates" and can "compete with staff members for influence over the inmate population." *Ibid.*

In addition, prison officials were concerned that publication of statements about other inmates would infringe on privacy rights. Pet. App. 110a-111a. "[I]n a correctional setting, real or imagined slights, insults or provocations can cause inmate on inmate violence that can have dire consequences for inmates, staff members, and the public safety." C.A. Supp. App. 12. Warden Lappin believed that prohibiting the publication of statements about other inmates was the least restrictive means of addressing that concern; the regulation "did not affect the content of the interview," only "the end result." *Ibid.* If a journalist wanted to include information obtained about another inmate, he could request an interview with that inmate. *Ibid.*

b. In March 2000, "60 Minutes" aired a face-to-face interview with Timothy McVeigh, another inmate housed in the SCU. Pet. App. 33a. More than a year later, on April 12, 2001, then-Attorney General John Ashcroft held a press conference to discuss logistics and policies surrounding McVeigh's scheduled execution, the first federal execution since 1963. See *id.* at 85a-102a. The press conference dealt primarily with the death-penalty procedures for McVeigh, and secondarily with the ban on face-to-face interviews. In discussing "media outlets" that had requested interviews with McVeigh, Attorney General Ashcroft stated that "[a]s an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. * * * I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. Media access to special confinement unit inmates

will be limited to each inmate's ordinary allotment of telephone time," which can be used "in any way they choose." *Id.* at 90a. When later asked by a reporter whether his "decision today" (apparently referring to the announced plan to allow victim and media witnesses to attend McVeigh's execution) might also "encourag[e] copycat crimes by the sensationalizing of these catastrophic events through extensive media coverage," Attorney General Ashcroft responded that he was "concerned about * * * a culture of violence," and about "irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly." *Id.* at 97a.

3. On April 24, 2001, petitioner filed this pro se *Bivens* action, seeking damages and injunctive relief against several federal officials in their individual and official capacities and alleging that they violated his First Amendment and equal protection rights by implementing and enforcing a policy that prohibits him from having face-to-face interviews with the media and from talking to the media about other inmates. The district court screened the complaint under 28 U.S.C. 1915A(b)(1) and dismissed it for failure to state a claim. Pet. App. 71a-79a.

The court of appeals reversed and remanded (Pet. App. 63a-70a), concluding that "[a]t th[e] early pleading stage," the district court should have taken petitioner's allegations as true and concluded that they stated a claim, *id.* at 69a.

Petitioner filed an amended complaint on January 2, 2003, alleging, *inter alia*, that THA-1480.05A violated

his First Amendment and equal protection rights.[2] On February 23, 2006, the district court granted summary judgment in favor of respondents. Pet. App. 49a-62a. The court explained that "inmates do not have a right to face-to-face interviews so long as other avenues of communication are open to them, and regulations denying face-to-face interviews are applied in a neutral, equal manner without regard to content." *Id.* at 54a (citing *Pell* v. *Procunier*, 417 U.S. 817, 827-828 (1974)). Applying the four *Turner* factors, see *Turner* v. *Safley*, 482 U.S. 78 (1987), the court concluded that petitioner had not met his burden of showing that the policy was not reasonably related to legitimate penological interests. Pet. App. 55a, 58a-62a.

4. After appointing counsel to brief and argue the appeal on petitioner's behalf, a panel of the court of appeals reversed and remanded, concluding that petitioner "raised a genuine issue of fact as to whether [respondents'] proffered justification for the policy banning face-to-face interviews is pretextual." Pet. App. 32a.

On petitioner's First Amendment claim, the panel read *Turner*'s first prong to require that "the penological interest that the prison officials invoke in court to justify the restriction must have actually motivated them at the time they enacted or enforced the restriction." Pet. App. 40a. According to the panel, petitioner had submitted evidence supporting his claim that the security justification for the policy was a pretext for "outrage over [Timothy] McVeigh's message and a de-

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[2] In March 2004, petitioner moved to dismiss his case, citing his imminent execution date of June 8, 2004, and the court dismissed the case without prejudice. Gov't C.A. Br. 7. The Third Circuit later stayed his execution, petitioner moved to vacate the judgment, and the district court reinstated the media-access claims. *Ibid.*

sire to prevent other death row inmates from expressing their views about themselves or their fates and thereby influencing 'our culture.'" *Id.* at 41a. In other words, the court believed that petitioner's evidence tended to show that Warden Lappin may have been "lying about the rationale" for the policy in his sworn declaration. *Id.* at 41a-43a, 45a. Turning to the other *Turner* factors, the panel concluded that the alleged "ban on discussing other inmates with the media," "cast doubt on whether the media policy leaves open sufficient alternate routes of access to the media." *Id.* at 43a.

On petitioner's equal protection claim—that the policy treated death row inmates at the SCU differently from other inmates—the panel was persuaded that a question of fact existed on whether such inmates were treated differently "because they are disproportionately likely to become jailhouse celebrities or inflame tensions with other inmates," or because they are "disproportionately likely to promote a 'glamorization of violence." Pet. App. 43a-44a. The panel left the issue of qualified immunity to the district court on remand. *Id.* at 46a.[3]

5. The court of appeals granted rehearing en banc, vacated the panel decision, and affirmed the judgment of the district court. Pet. App. 1a-30a.

a. The en banc court recognized that this Court had already upheld a system-wide BOP policy prohibiting face-to-face interviews by the media, Pet. App. 4a (citing *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974)), and rejected petitioner's argument that BOP could not enforce that rule against some prisoners but not others,

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[3] The panel also held that the district court erred in denying petitioner's motions for a continuance and for counsel, and in granting summary judgment for respondents John Ashcroft and Kathleen Hawk-Sawyer. Pet. App. 45a-48a.

id. at 4a-5a. The court explained that the rule was based on security needs, and the need for security differs at different institutions. *Ibid.* A case in point, the en banc court observed, was the policy upheld in *Washington Post* itself, which allowed media interviews at minimum-security institutions but not medium- or maximum-security institutions. *Id.* at 5a. The court concluded that BOP was not required to permit access to *all* prisoners simply because it allowed access to some, nor was it required to use the least restrictive alternative. *Id.* at 5a, 6a-7a. *Turner* requires only that a prison choose a rule "reasonably related to legitimate security interests," a condition the court found satisfied here. *Id.* at 6a-7a.

The court rejected petitioner's claim that the current policy was prompted by criticism of Timothy McVeigh's interview with "60 Minutes," and that Attorney General Ashcroft was motivated by a desire to silence death-row inmates. Pet. App. 8a-9a. The court explained that a "blanket ban," as opposed to a case-by-case approach, was "neutral" as to content. *Id.* at 7a. And the court found it unclear "why one bad motive would spoil a rule that is adequately supported by good reasons." *Id.* at 10a. After all, the court observed, this Court "did not search for 'pretext' in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry." *Ibid.*

The en banc court also found "nothing unconstitutional" about Attorney General Ashcroft's views: "[o]pposing a 'culture of violence' is an ordinary, and desirable, goal for a criminal prosecutor." Pet. App. 11a. Indeed, the court explained, the desire to prevent people from becoming "celebrities by committing crimes," was found to be a legitimate basis for curtailing press access

in *Washington Post*, "not a constitutionally infirm one." *Ibid.* The court concluded that where, as here, prisoners have access to the press through written correspondence and telephone calls, prohibiting face-to-face interviews does not unduly infringe on prisoners' constitutional rights. *Id.* at 13a-14a.

As for the prohibition on publishing information about other inmates, the court found it rational to think (as prison officials did) that "[t]elling tales about fellow inmates may make them angry (if the tales are defamatory) or may make yet other inmates envious (if the tales are flattering). In either event, disorder may follow." Pet. App. 14a. The court concluded that, because other avenues of expression (including the courts) were available, concerns that misconduct would be concealed were misplaced and outweighed by the legitimate governmental interest. *Id.* at 14a-15a.

Because it agreed that THA-1480.05A was valid, the court did not decide whether a *Bivens* action was a proper vehicle for challenging an administrative rule, or whether qualified immunity should attach. Pet. App. 3a-4a.

b. The panel judges dissented. Pet. App. 15a-23a, 23a-30a. Judge Rovner, joined by Judge Bauer, argued that the original panel opinion reached only "the limited—indeed, even pedestrian—conclusion that a trier of fact must resolve" whether the "jailhouse-celebrity concern" put forward by the Warden was "legitimate" or a "convenient explanation to justify a policy designed to control the speech content of a particular subset of prisoners." *Id.* at 16a. The dissent was concerned about the lack of alternative means to specifically discuss other inmates, believing that "[u]nder the current policies an inmate could be disciplined for informing the media

* * * that another inmate is being abused by a guard." *Id.* at 20a. They found it "irrational" to treat death row inmates differently "based solely on their particular sentence," *id.* at 22a, and saw no impediment to deposing former Attorney General Ashcroft "who, after all, chose to speak publicly about the rationale behind the media ban," *id.* at 23a.

Judge Wood wrote separately to highlight her "own concerns with the majority's opinion"—namely, that "the record does not support certain key assumptions made"; that further development of the record should have been permitted; and that the rule adopted by the majority "permit[s] wholesale censorship in prisons" "[t]o the extent that [it] has swept away the need to show adequate alternative avenues for communication." Pet. App. 23a-24a, 29a.

ARGUMENT

Petitioner contends (Pet. 11-29) that the ban on face-to-face interviews with the media violates prisoners' First Amendment and equal protection rights because the policy is a permanent ban that only applies to death row inmates housed at the SCU and, because all of those inmates are male, the policy discriminates on the basis of gender and sentence, and because the "true" motivation for the ban was to silence death-row inmates. The court of appeals' decision is correct and does not conflict with any decision of this Court. Petitioner's claimed conflict with other courts of appeals is overstated and would not result in a different outcome here. Further review is not warranted.

1. In a pair of decisions issued in 1974, *Pell* v. *Procunier*, 417 U.S. 817, and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, this Court held that prison policies barring

prisoners from face-to-face interviews with the media were consistent with the First Amendment. In *Pell*, the Court held that "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved," prisoners have no constitutional right to communicate with the media in person. 417 U.S. at 826; *id.* at 835-836 (Powell, J., dissenting) ("agree[ing] with the majority" that inmates do not "have a personal constitutional right to demand interviews with willing reporters").

In both cases, this Court explicitly endorsed the "jailhouse-celebrity" rationale. In *Pell*, the Court explained that allowing face-to-face interviews "had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual 'public figures' within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems." *Pell*, 417 U.S. at 831-832. In *Washington Post*, the Court stated: "As a result those inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." 417 U.S. at 848-849.

And, in both cases, the Court relied on the availability of alternative means of communicating with the general public, and with the press. See *Pell*, 417 U.S. at 823-824 (noting other means for "communication with persons outside the prison, including representatives of the news media"); *Washington Post*, 417 U.S. at 847-848 (noting other avenues of press access to the prison); see also *Turner* v. *Safley*, 482 U.S. 78, 88 (1987) (observing

that *Pell* focused on whether "prisoners had other means of communicating with members of the general public"). Those alternatives included direct communication with the press by written correspondence, and limited visitation by designated categories of family and friends (who could, in turn, communicate with the press on the inmate's behalf). See *Pell*, 417 U.S. at 824-825; *Washington Post*, 417 U.S. at 846-847.

The same "jailhouse celebrity" concerns approved of in *Pell* and *Washington Post* prompted the policy at issue in this case. See C.A. Supp. App. 11. And the same alternative means of communicating with the general public and the press exist. See Pet. App. 105a-106a. Indeed, at Terre Haute, death-row inmates have access to monitored and unmonitored telephone calls with the media, a form of communication that was unavailable to the prisoners in the two earlier decisions.

Nothing has changed in this Court's prison jurisprudence in the past 35 years to put those holdings in doubt. To the contrary, this Court has repeatedly reaffirmed the decision and reasoning in *Pell*. See, *e.g.*, *Overton* v. *Bazzetta*, 539 U.S. 126, 132 (2003) (relying on analysis in *Pell*, which was "cited with approval in *Turner*"); *Thornburgh* v. *Abbott*, 490 U.S. 401, 409, 415 (1989) (citing *Pell* with approval); *Turner*, 482 U.S. at 86, 88, 90 (same). If anything, the subsequent cases have established a level of judicial deference to prison policies that is greater than the deference shown in *Pell* and *Washington Post*.

2. Nonetheless, petitioner faults the en banc court for applying this Court's controlling precedent in *Pell* and *Washington Post*, rather than the four-factor test announced in *Turner*. Pet. 23-24. Petitioner does not ask this Court to overrule its earlier cases, nor does he

suggest that the policies at issue in *Pell* and *Washington Post*—permanent rules barring face-to-face interviews—would fail under the *Turner* standard. Instead, petitioner seeks to distinguish THA-1480.05A from the policies upheld in those cases. Pet. 23-29. None of the supposed distinctions withstands scrutiny or warrants further review.

First, petitioner asserts (Pet. 13, 23-28) that the SCU policy applies only to a "sub-class of prisoners"—a subclass defined by gender and sentence.

As an initial matter, petitioner's claim that the media policy is invalid because it involves the "differential treatment" of men and women (Pet. 26; see Pet. 13, 25, 27) was never raised below at any stage of this litigation, and thus is not properly before the Court. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992) (Court ordinarily will not consider issues neither raised nor resolved by the court of appeals.); *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988) (Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."). In any case, THA-1480.05A says nothing about gender; the policy barring face-to-face media interviews simply applies to Terre Haute SCU inmates sentenced to death, *i.e.*, the male death-row inmates currently in the BOP. An Institution Supplement, by definition, is limited to a particular institution. If a media-access policy were to cover the two female death-sentenced inmates in the federal system, it would have to be issued by the warden at the Federal Medical Center in Carswell, Texas, where they are housed. Petitioner's reasoning presumably would make any regulation issued by the SCU regarding

death row inmates invalid unless an identical regulation had issued at Carswell. That cannot be the law.[4]

Petitioner's claim that the policy is invalid because it applies only to death-row inmates housed at the SCU is equally without merit. By the time this Court decided *Washington Post*, the BOP had revised its policy to permit inmate interviews in minimum-security prisons, *i.e.*, treating a "sub-class" of prisoners differently than those at higher-security prisons. 417 U.S. at 844 & n.2. The Court expressed no concern with that distinction—and for good reason. The "principal reason for limiting press contacts is the maintenance of security," Pet. App. 4a, and there are different security needs at different institutions. *Id.* at 5a ("It is easier to justify limiting press contacts at the few places holding the most incorrigible prisoners (USP Florence and the SCU at Terre Haute) than at all medium- and maximum-security prisons."); cf. *Turner*, 482 U.S. at 95 n.* (This Court's precedents "make clear * * * [that] the Constitution 'does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions,'" particularly when "different security concerns" are present.) (citation omitted). As the en banc court of appeals held, the BOP need not choose between the nationwide (or near-nationwide) ban upheld in *Washington Post*, and no limitation at all. See Pet. App. 5a.

Second, petitioner describes the prohibition on face-to-face interviews with the media as a "permanent ban,"

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[4] Indeed, under petitioner's reasoning, any policy established for an institution housing only men is potentially invalid. Respondents are informed that, as of September 9, 2009, 93.3% of the federal prison population was male. The remaining 6.7% who were female are housed separately.

and suggests that this "permanent ban" "squarely presents" a question left unresolved in *Beard* v. *Banks*, 548 U.S. 521, 536 (2006), and *Bazzetta*, 539 U.S. at 134. Pet. 13, 18, 23, 27-29. But petitioner concedes that numerous "permanent" bans have been upheld by this Court. See Pet. 27 (citing five decisions and conceding that "the Court has upheld 'permanent' restrictions that apply equally and neutrally to an entire prison population"). He argues only that such "permanent" bans cannot be applied to a "sub-class" of prisoners. *Ibid.* That is incorrect.

As discussed above, the Court in *Washington Post* already upheld a "permanent" ban on exactly this sort of media contact that applied only to a sub-class of prisoners. But, more fundamentally, the skepticism expressed in *Bazzetta* and reiterated in *Banks* is not implicated here. In *Bazzetta*, this Court observed that if a ban on "all visitation" for certain inmates was treated as "permanent," it might "reach a different conclusion in a challenge to a particular application of the regulation." 539 U.S. at 134. In *Banks*, the Court quoted that language and upheld a prison policy denying "newspapers, magazines, and photographs" to the "worst of the worst" inmates, where there was no alternative means of exercising that right. 548 U.S. at 524, 530.

Petitioner challenges the validity of a policy prohibiting all death row inmates at SCU from participating in face-to-face interviews with the media. That is not a permanent ban on all visitation, nor does it foreclose other avenues of expression. Inmates at SCU, like petitioner, are prohibited from engaging in one specific type of contact, an in-person interview, with one specific type of visitor, the media. They are free to contact the press through written correspondence or authorized telephone

calls, and to communicate with the general public through face-to-face visits with family and friends. That this more limited ban is "permanent" might be relevant to the *Turner* analysis, but it does not warrant a different inquiry or a different outcome here.

Third, petitioner claims (Pet. 24-25) that the policies at issue in *Pell* and *Washington Post* did not restrict an inmate's ability to communicate with the media through written correspondence, whereas petitioner could not discuss other inmates with the media. Petitioner does not dispute that there are other means for him to communicate with the general public and the press; he argues only that there are no reasonable means for him to communicate information *about other inmates* to the press. That argument lacks merit.

Petitioner fundamentally misunderstands the nature of the inquiry under the second prong of *Turner*, which asks "whether * * * alternative means of exercising the right * * * remain open to prison inmates." 482 U.S. at 90. *Abbott*, 490 U.S. at 417, makes clear that "'the right' in question must be viewed sensibly and expansively." Thus, the right in question here is the right to communicate with the general public. See *Pell*, 417 U.S. at 823 (examining the regulation "in the light of the alternative means of communication permitted under the regulations with persons outside the prison"); see *Abbott*, 490 U.S. at 417-418 (Court "held in *Turner* that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available, and in *O'Lone* [v. *Estate of Shabazz*, 482 U.S. 342 (1987)] if prisoners were permitted to participate in other Muslim religious ceremonies.") (citations omitted). Like the prisoners in *Washington Post* and *Pell*, petitioner retains that right.

Petitioner and amici also misunderstand the scope of THA-1480.05A and, in particular, Attachment A, which prohibits the media from "asking or discussing * * * any information regarding other federal or state inmates," and from "publishing such information." Pet. App. 110a.[5] That prohibition is directed solely at the media, and petitioner has no standing to challenge it. See *id.* at 73a. Moreover, as Warden Lappin explained, the regulation does "not affect the content of the interview," only the "end result." C.A. Supp. App. 12. "If the news media representative wished to include information about another inmate in his or her article, an interview with that inmate could be requested." *Ibid.*

Thus, the court of appeals correctly rejected petitioner's proposed distinctions and applied this Court's controlling precedents in *Pell* and *Washington Post* to uphold the challenged regulation. That decision does not conflict with any other court of appeals' decision and this Court's review is not warranted.

3. a. Petitioner next contends (Pet. 11-23) that further review is needed because the en banc decision misapplied the first *Turner* factor by accepting an allegedly post-hoc security justification for the policy, instead of the "admit[ted]" goal of suppressing speech, Pet. 16, as spelled out in a press conference by then-Attorney General Ashcroft. That contention is mistaken.[6]

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[5] To the extent petitioner's challenge rests on letters written by the Warden before THA-1480.05A was announced, those claims are case- and fact-specific and do not warrant further review.

[6] Petitioner does not suggest any nefarious motive underlying the restriction precluding the *media* from publishing information about other inmates. Pet. App. 110a-111a. As stated in Attachment A to THA-1480.05A, that restriction was issued to "maintain the safety, security and good order of the SCU," to protect "the privacy interests

The first *Turner* factor asks whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (citation omitted). In considering whether the penological goal "put forward" by prison officials is rationally connected to the policy, the court must ensure that the goal is "legitimate and neutral." *Id.* at 90. In this context, a goal is "neutral" as long as it "further[s] an important or substantial governmental interest unrelated to the suppression of expression." *Abbott*, 490 U.S. at 415 (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974)).

Petitioner argues that even though *Turner* and its progeny made clear that courts must "accord substantial deference to the professional judgment of prison administrators," Pet. 16 (quoting *Bazzetta*, 539 U.S. at 132), those cases "did not consider whether such deference must be given to non-contemporaneous explanations offered only in litigation declarations authored by lawyers long after the fact," *ibid.*[7] But this is not a case of post-hoc justifications offered by government lawyers in the course of litigation.

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of the other inmate[s]," and to prevent "a reaction that could threaten the safety, security, or good order of the institution." *Ibid*; see C.A. Supp. App. 12 ("real or imagined slights, insults or provocations can cause inmate on inmate violence that can have dire consequences for inmates, staff members, and the public safety").

[7] See also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 353 (1987) ("We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration,' for the determinations of those charged with the formidable task of running a prison.") (citation omitted). This deference is particularly appropriate when a challenged policy governs the most violent and dangerous prisoners. *Lewis* v. *Casey*, 518 U.S. 343, 361 (1996).

The security of our nation's prisons is indisputably a legitimate and content-neutral goal. And, contrary to petitioner's suggestions, that rationale was contemporaneously "put forward," *Turner*, 482 U.S. at 89, to justify THA-1480.05A. The Institution Supplement itself, which petitioner ignores, explains that the ban on in-person interviews was enacted "[t]o maintain safety, security and the good order of the SCU." See Pet. App. 105a. Elaborating on that reason, Warden Lappin explained in a sworn declaration that prison officials were concerned that inmates would gain "special status" through media exposure, and that this threatened prison security because an inmate with greater status can become a "jail celebrit[y]" who is an "authority figure to other inmates" and can "compete with staff members for influence over the inmate population." C.A. Supp. App. 11. This Court has relied on "justifications" set forth "in [a summary judgment] motion" and accompanying affidavit of a prison official as "evidence." See *Banks*, 548 U.S. at 530. And these are the same reasons "put forward" by prison officials, and accepted by this Court, in *Pell* and *Washington Post*. See p. 12, *supra*.

Petitioner next contends that the en banc court erred in failing to credit his allegation that Warden Lappin was lying, and that the true motivation underlying the policy was then-Attorney General Ashcroft's "personal view[s]" and his desire "to restrict a mass murderer's access to the public podium" and "to prevent the 'irresponsible glamorization of a culture of violence.'" Pet. 2-3 (quoting Pet. App. 90a); see also Pet. 7. That argument is equally misplaced.

Turner's first factor does not provide for consideration of the subjective motivation of a particular prison official or law enforcement officer. *Turner* speaks of the

goal or interest "put forward" by prison officials; it does not suggest that courts may question the sincerity of an admittedly legitimate and neutral penological goal. Indeed, when this Court rejected the *Turner* test for race-based prison policies, it expressed a concern that the analysis under *Turner* might allow segregation "if prison officials *simply asserted* that it was necessary to prison management." *Johnson* v. *California*, 543 U.S. 499, 514 (2005) (emphasis added); see *id.* at 513, 514 (*Turner* is not designed to "ferret out invidious uses of race"; application of *Turner* standard "would make rank discrimination too easy to defend"); see also *Waterman* v. *Farmer*, 183 F.3d 208, 214 (3d Cir. 1999) (assuming that the legislative goal behind the statute was rehabilitation and rejecting the district court's contrary assumption, which had been based on the lack of legislative history and the state corrections department's opposition to the statute).

Eschewing inquiries into subjective motivation is consistent with rational basis review in the equal protection context. See *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). And courts have often equated *Turner*'s first factor with a rational basis standard. See, *e.g.*, *Amatel* v. *Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), cert. denied, 527 U.S. 1035 (1999); *Waterman*, 183 F.3d at 215; *Mauro* v. *Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1018 (2000). Far from permitting courts to order discovery into a former Attorney General's subjective motivation, the first factor of *Turner* and its rational-

basis principles require courts to accept the goal "put forward" by prison officials, and to consider the rationality of the connection between the policy and that goal.

A contrary approach would significantly undermine the intent of *Turner*—to give prison officials the ability to operate and manage prisons without undue judicial interference. As even the panel recognized below, prisoners are resourceful litigators who have little trouble alleging evidence of malfeasance, Pet. App. 45a, and when subjective motivation becomes an issue, it will be difficult to weed out baseless claims before trial. See *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) ("Because an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials.").

Respondents are, of course, sensitive to the possibility that in an unusual case a prison official might misrepresent the penological goal behind the challenged policy during litigation. But that issue is readily dealt with under *Turner*, which objectively looks at whether the connection between the policy and the penological goal put forward by prison officials is rational and whether the policy represents an exaggerated response to the problem. 482 U.S. at 89-91. A penological goal falsely put forward to cover up the true, improper motivation for a policy is unlikely to have a rational connection to the policy or to be a reasonable response to the problem. For example, in *Turner* itself the Court held that common sense suggested there was no rational relationship between the prohibition of marriages and the purported security rationale of preventing "love triangles," and that the prohibition was an exaggerated response to

security concerns that could have been addressed with a more limited restriction. *Id.* at 98; see also *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 366 n.4 (2001) (explaining that policies have been struck down within the rational basis framework when the "purported justifications" did not make "sense in light" of the treatment of "similarly situated" groups). The first and fourth factors of *Turner* are designed to uncover many, if not all, of those questionable cases. This is not one of them.

b. Petitioner also argues (Pet. 12, 18-20) that the court of appeals' decision conflicts with other circuits, which hold that the legitimacy of prison regulations "must be measured by reasons that were put forth at the time the policy was adopted." In asserting a conflict between the en banc court here and other courts of appeals, petitioner relies on language in those cases but overstates their holdings. And this case presents an unsuitable vehicle to address any purported conflict because the outcome would remain the same.

In *Salahuddin* v. *Goord*, 467 F.3d 263, 275 (2d Cir. 2006) (cited at Pet. 18-19), the court stated that prison officials need only satisfy the "limited burden" of "identifying" the penological goal. The actual holding there was that the reasons for the policy had to be *in the record* to satisfy the government's summary judgment burden, *id.* at 277 ("Post hoc justifications with no record support will not suffice.")—not that the court may question what those reasons really are. Here, the security justification for the Institution Supplement was in the record. See p. 20, *supra*.

In *Abu-Jamal* v. *Price*, 154 F.3d 128, 134, 137 (3d Cir. 1998) (cited at Pet. 19), the plaintiff raised an as-applied challenge asserting that prison officials were

enforcing a rule against him "because of the content" of his writing, and that the rule was not being enforced against other similarly situated inmates engaged in the same activity. The prison officials offered only the vaguest of justifications for their rule. *Id.* at 134 (rule "justified by 'multifarious purposes and the impossibility of accommodating the practice of a profession or business in a penal setting'") (citation omitted). And one of the justifications—compensation—was plainly irrelevant to the case. *Ibid.* ("under the Department's own regulations, compensation is irrelevant in these circumstances"). Likewise, in *Quinn* v. *Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (cited at Pet. 20), the challenge was as-applied and the prison officials' assertion that they had required the plaintiff-prisoners to have their hair cut out of concern for gang-related hair was implausible on its face, since they received the memorandum warning about gang hair *after* they had ordered the haircuts. Here, petitioner challenges a rule that is applied equally to all death row inmates at the SCU, and prison officials offered a contemporaneous and facially valid justification for that rule.

Finally, *Walker* v. *Sumner*, 917 F.2d 382, 385-386 (9th Cir. 1990) (cited at Pet. 20), required "evidence" supporting the interest "put forward" by prison officials. There, "[t]he only attempted justification" was a "bare and unsupported assertion in their *motion*"; there was no evidence "either in the form of deposition testimony or affidavits to justify their policy." *Id.* at 386-387 (emphasis added). In contrast, here the interest was codi-

fied in the policy itself and supported by the declaration of Warden Lappin—"evidence" by any standard.[8]

* * * * *

In the end, contrary to petitioner's and amici's concerns, nothing about this policy prevents death row inmates, like petitioner, from speaking to the press about "the administration of the death penalty" or "the proper treatment of prisoners," or deprives the general public of "access to accurate information about the conditions inside prisons." See, *e.g.*, Pet. 21-22; National Lawyers Guild Amicus Br. 3. Petitioner does not (and could not) claim that the policy was motivated by a desire to conceal prison conditions or details concerning administration of the death penalty. Cf. *Pell*, 417 U.S. at 830 (noting that the regulation was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions"); *Washington Post*, 417 U.S. at 848 (examining the alternative means of communication and finding it "[t]hus * * * clear that [the policy was] not part of any attempt by the [BOP] to conceal from the public the conditions prevailing in federal prisons"). THA-1480.05A simply prohibits death row inmates at the SCU

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[8] Moreover, *Walker* has been substantially narrowed by the Ninth Circuit. See *Frost* v. *Symington*, 197 F.3d 348, 355 (1999) (en banc decision in *Mauro* v. *Arpaio*, *supra*, "appears to have implicitly called [*Walker*'s] underpinnings into question"); *ibid.* (explaining that *Mauro* "ruled that as a matter of law the prison's purported motivations were legitimate"). *Frost* reconciled *Mauro* and *Walker* by limiting *Walker* to cases involving the rationality of the policy, as opposed to the goal itself—that is, to cases in which the inmate produces evidence tending to refute a common-sense relationship between the goal and the policy. It is doubtful that the snippet of *Walker* that petitioner quotes is still good law in the Ninth Circuit.

from speaking to the press *in person* about such matters. A far more expansive prohibition was countenanced by this Court more than thirty years ago in *Washington Post* and in *Pell*, and nothing about the present case warrants this Court to revisit those decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys

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